

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of:

Petition of Biolase, Inc. for Retroactive Waiver
of 47 C.F.R. § 64.1200(a)(4)(iv)

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) GC Docket No. 02-278
) GC Docket No. 05-338
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PETITION OF BIOLASE, INC. FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the rules of the Federal Communications Commission (the “FCC” or “Commission”),¹ Biolase, Inc. (“Biolase” or “Petitioner”), by and through its undersigned counsel, respectfully requests a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the “Opt-out Requirement”) with respect to facsimile advertisements that have been transmitted by or on behalf of Biolase prior to April 30, 2015 with the express prior invitation or permission of the recipients or their agents. The Commission has granted over 130 retroactive waivers to similarly-situated parties.² Petitioner asks for the same relief.

¹ 47 C.F.R. § 1.3.

² *Rules And Regulations Implementing The Telephone Consumer Protection Act Of 1991; Junk Fax Prevention Act of 2005; Application For Review Filed By Anda, Inc.; Petitions For Declaratory Ruling, Waiver, And/Or Rulemaking Regarding Fax Opt-Out Requirements*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) (“*2014 Anda Commission Order*”); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 8598 (2015) (“*August 2015 Order*”); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 14057 (2015) (“*December 2015 Order*”).

A. BACKGROUND OF THE OPT-OUT REGULATION

The Telephone Consumer Protection Act (“TCPA”) prohibits the use of a fax machine to send unsolicited advertisements, subject to certain exceptions.³ “Unsolicited advertisement” is defined to mean “material advertising . . . any property, goods, or services which is transmitted to any person *without that person’s prior express invitation or permission . . .*”⁴ In 2005, Congress enacted the Junk Fax Prevention Act, which requires the sender of an unsolicited fax advertisement to provide specific information that would allow recipients to ‘opt-out’ of any future fax transmissions from the sender.⁵

In implementing the Junk Fax Prevention Act, the Commission imposed an opt-out notice requirement on *solicited* fax advertisements by adopting the Opt-out Requirement, which states that fax advertisements “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.”⁶ This requirement seemingly contradicted the plain wording of the statute, the application of which is limited to *unsolicited* advertisements. In addition, the order adopting the rule (the “Junk Fax Order”) included a footnote that stated “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”⁷ Further, the associated Notice of Proposed Rulemaking did not explicitly indicate that the Commission was contemplating an opt-out requirement on

³ 47 U.S.C. § 227(b)(1)(C).

⁴ 47 U.S.C. § 227(a)(5) (emphasis added).

⁵ 45 U.S.C. § 227(b)(1)(C)(iii), (b)(2)(D).

⁶ See 47 C.F.R. § 64.1200(a)(4)(iv); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, App. A (2006) (“*Junk Fax Order*”).

⁷ *Junk Fax Order* at 3810, n. 154 (emphasis added).

facsimiles sent with the recipient's prior express permission.⁸ These apparent conflicts led to considerable confusion in the industry.

In the *2014 Anda Commission Order*, the Commission recognized that due to the contradictory footnote in the *Junk Fax Order* and the ambiguity in the Notice of Proposed Rulemaking, some parties that had sent fax advertisements with the recipients' prior express permission may have reasonably been uncertain as to whether the Opt-out Requirement applied to them.⁹ Accordingly, the Commission granted a retroactive waiver of the Opt-out Requirement to certain petitioners facing lawsuits premised, in part, on the failure to include opt-out language in faxes sent with prior express invitation or permission.¹⁰ The *2014 Anda Commission Order* further afforded those similarly-situated to the petitioners therein an opportunity to request retroactive waiver and encouraged parties to file such requests within six months of the release date, *i.e.*, April 30, 2015.¹¹ However, the date was not fixed and waivers may be granted after that date. The Consumer and Governmental Affairs Bureau (the "Bureau") has in fact granted waivers filed well beyond April 30, 2015.¹²

Notably, in the *December 2015 Order*, the Bureau granted relief to parties filing waiver requests through September 21, 2015. The Bureau declined to reject the petitions solely on the basis that they were filed after the six-month filing date referenced in the *2014 Anda Commission Order*. The Bureau noted that all five of the petitions sought waiver for faxes sent prior to the

⁸ *2014 Anda Commission Order* at ¶ 25.

⁹ *Id.* at ¶¶ 24-26.

¹⁰ *Id.* at ¶¶ 1, 26-27.

¹¹ *Id.* at ¶ 30.

¹² *August 2015 Order* at ¶ 20 (granting waivers to petitions filed in May and June of 2015); *December 2015 Order* at ¶ 18 (granting waivers to petitions filed through September of 2015).

April 30, 2015 deadline imposed by the *2014 Anda Commission Order* and concluded that “granting waivers to the five parties here does not contradict the purpose or intent of the initial waiver order because these parties are similarly-situated to the initial waiver recipients.”¹³

Since the *2014 Anda Commission Order*, the Commission has granted over 130 retroactive waivers of the Opt-out Requirement to parties that have asserted in waiver requests that (i) the subject faxes were sent without compliant opt-out provisions to recipients who had previously provided permission or consent to receive them; and (ii) that such faxes should not be subject to TCPA liability because there was industry-wide confusion caused by the seemingly contradictory statements contained in a footnote in the *Junk Fax Order* and the Opt-out Requirement.¹⁴

B. FACTS OF THE BIOLASE CASE

Biolase is a medical device company that develops and sells laser systems and imaging equipment for use in dentistry and medicine. Biolase communicates with its customers by sending facsimiles that describe its products and services.

On February 24, 2016, a recipient of two faxes allegedly sent on Biolase’s behalf in December of 2013, filed a lawsuit against Biolase on behalf of himself and as representatives of a proposed class of similarly-situated persons in the United States District Court for the Northern District of Illinois (the “Court”) captioned *Shulruff v. Biolase, Inc. et al.*, Case No. 1:16-cv-02533 (the “Biolase Case”). The suit alleges that Biolase is liable under the TCPA for, among other things, sending two facsimile advertisements to the named plaintiff in December of 2013 that did not display the proper opt-out language.¹⁵ The named plaintiff seeks class certification

¹³ *December 2015 Order* at ¶ 18.

¹⁴ *Id.* at ¶¶ 8, 13 n. 55.

¹⁵ *Id.* at ¶¶ 9, 10, 16.

for “(a) all persons (b) who, on or after a date four years prior to the filing of this action (28 U.S.C. § 1658), (c) were sent faxes by or on behalf of defendant, Biolase, Inc., promoting its goods or services for sale (d) and which did not contain an opt out notice as described in 47 U.S.C. §227.”¹⁶ The proposed class includes all persons who received the faxes at issue regardless of whether they were solicited or unsolicited.

Biolase answered the complaint on April 14, 2016. The proposed class has not been certified and there is no motion for class certification pending in the proceeding. The parties exchanged initial disclosures on August 18, 2016 and a joint discovery was submitted on August 26, 2016.

This Petition does not request that the Commission resolve the factual or legal questions raised in the pending litigation against Biolase, including whether any particular recipient provided prior express permission to receive a fax from Biolase; such issues remain within the jurisdiction of the Court. As the Bureau indicated in the *December 2015 Order*, “the granting of a waiver does not confirm or deny that the petitioners had the prior express permission of the recipient to send the faxes. That remains a question for the trier of facts in the private litigation.”¹⁷

Here, Petitioner seeks the same relief afforded to over 130 petitioners in the *2014 Anda Commission Order*, *August 2015 Order*, and *December 2015 Order*.

C. GOOD CAUSE EXISTS TO GRANT BIOLASE A RETROACTIVE WAIVER

Pursuant to 47 C.F.R. Section 1.3, the Commission may waive any provision of its rules for “good cause shown.” Specifically, a waiver may be granted if: “(1) special circumstances

¹⁶ *Shulruff v. Biolase, Inc. et al.*, Case No. 1:16-cv-02533, Complaint ¶ 27 (N.D. Ill. Feb. 24, 2016).

¹⁷ *2014 Anda Commission Order* at ¶ 31; *December 2015 Order* at ¶ 16.

warrant deviation from the general rule, and (2) the waiver would better serve the public interest than would application of the rule.”¹⁸ The Commission should grant Petitioner the requested waiver for the same reasons that waivers were granted in the *2014 Anda Commission Order*, *August 2015 Order*, and *December 2015 Order*.

First, special circumstances warrant deviation from the general rule. As the Commission and the Bureau recognized in those prior decisions, the *Junk Fax Order* “caused confusion or misplaced confidence” as to whether the Opt-out Requirement applied to solicited fax advertisements because the *Junk Fax Order* stated that the “opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”¹⁹ In addition, the Commission’s notice of intent to adopt Section 64.1200(a)(4)(iv) likewise “did not make explicit that the Commission contemplated an opt-out requirement on fax advertisements sent with prior express permission of the recipient” thereby further contributing to the confusion or misplaced confidence about the opt-out notice requirement.”²⁰ As in the prior orders regarding retroactive waiver of the Opt-out Requirement, the confusion caused by the inconsistent statement in the *Junk Fax Order* and the lack of explicit notice warrants deviation from the Opt-Out Requirement and supports granting a retroactive waiver here.²¹

Second, granting the requested waiver would serve the public interest. Like the petitioners that were already granted retroactive waivers of the Opt-out Requirement in previous Commission and Bureau orders, Biolase faces potentially significant class action litigation on the basis of the purported non-compliant opt-out notice from fax recipients who provided prior

¹⁸ *2014 Anda Commission Order* at ¶ 23.

¹⁹ *Id.* at ¶ 24 (emphasis added).

²⁰ *Id.* at ¶ 25.

²¹ *See December 2015 Order* at ¶ 13; *August 2015 Order* at ¶ 14.

consent to receive Biolase's faxes. In the *2014 Anda Commission Order*, the Commission noted that "confusion or misplaced confidence . . . left some businesses potentially subject to significant damage awards under the TCPA's private right of action," and the "TCPA's legislative history makes clear our responsibility to balance legitimate business and consumer interest."²² Based on these circumstances, the Commission concluded that, on balance, the public interest was served by "grant[ing] a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward."²³ The same public interest supports granting Biolase a waiver in this case for all similarly consented to faxes transmitted prior to April 30, 2015.

D. CONCLUSION

For the foregoing reasons, Biolase respectfully requests that the Commission grant a retroactive waiver from the provisions of 47 C.F.R. Section 64.1200(a)(4)(iv) for facsimile advertisements that have been transmitted by or on behalf of Biolase prior to April 30, 2015 with the express prior invitation or permission of the recipients or their agents, affording the same relief previously granted by the Commission and the Bureau to 130 similarly-situated petitioners.

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Respectfully submitted,

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²² *2014 Anda Commission Order* at ¶ 27.

²³ *Id.*